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IN THE

United States Supreme Court

No. 964

NORMAN BENNETT

Petitioner

vs.

FORD MOTOR COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI

SAMUEL INTRATER
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IN THE

United States Supreme Court

NORMAN BENNETT

Petitioner

vs.

FORD MOTOR COMPANY

Respondent

Petition for Writ of Certiorari

I.

Petitioner seeks a review of the decision of the United States Court of Appeals for the District of Columbia Circuit, dated November 7, 1963. Petition for rehearing was denied on December 27, 1963. Thereafter, this Court, on March 19, 1964, extended the time for filing this petition until April 1, 1964.

II.

Jurisdiction of this Court is based on 28 U.S.C. §1254. Jurisdiction originally in the United States District Court for the District of Columbia was based on 28 U.S.C. §§1338, 1400.

III.

The questions presented are:

1. Was petitioner denied the right to trial by jury of factual issues in a patent infringement case in which trial by jury had been demanded?

2. Where other Federal Circuits have held that factual issues in patent infringement cases should be submitted to a jury, where jury trial is demanded, has the District of Columbia Circuit departed from this standard?

IV.

This case involved a suit for patent infringement of an automobile bumper, patented by petitioner. This bumper involved safety factors of great public importance in its method of absorbing and dissipating shocks of impact. (Joint Appendix, 11-19, 113.) The patent, inter alia, described the bumper as "substantially resilient." Petitioner's expert witness, as well as petitioner, himself an engineer, testified that respondent's bumpers embodied the elements of petitioner's patent and their operation was the same as with petitioner's patent. (J.A. 47-53, 112-123.) Respondent produced its bumpers after having received correspondence from petitioner describing his patent. (J.A. 53-4.)

This testimony also showed respondent's bumper to be resilient, like petitioner's patent. (J.A. 26-8, 35, 42, 47, 55, 74, 109-112, 122-6, 128, 132-8.)

Despite this positive testimony, and with *no* contradictory evidence, the Court ruled that respondent's bumper was not resilient, and directed a verdict for respondent. (J.A. 184-6.)

V.

Thus the trial court took away from the jury its function of determining the factual issue of infringement. This conflicts with the ruling of this Honorable Court, in *United*

States v. Esnault-Pelterie, 299 U.S. 201, 205, as well as the rulings of other circuits, in *Moist Cold Refrig. Co. v. Lou Johnson Co.*, 249 F.2d 246, 255-6, and *Hansen v. Safeway Stores, Inc.*, 238 F.2d 198, 200. Moreover, the fact that steel structures, such as these bumpers, are resilient has been judicially recognized in the Ninth Circuit, in *Reinharts, Inc. v. Caterpillar Tractor Co.*, 85 F.2d 628, 634.

This action of the trial court, affirmed in a Per Curiam opinion, thus operated:

a. To deprive petitioner of his Constitutional right to a trial by jury; and

b. To conflict with decisions of this Court and other Federal Circuits that such issues of fact in a patent infringement case, should be submitted to a jury.

Wherefore, petitioner prays that this court accept for review the action of the Court of Appeals in this case.

Respectfully submitted,

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Attorney for Petitioner

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17509

NORMAN BENNETT, APPELLANT

v.

FORD MOTOR COMPANY, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided November 7, 1963

Messrs. Albert Brick and *Elliott I. Pollock*, with whom *Mr. Samuel Intrater* was on the brief, for appellant.

Mr. Ralph L. Chappell, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Leo A. Rosetta* and *Laidler B. Mackall* were on the brief, for appellee.

Before WASHINGTON, BURGER and MCGOWAN, *Circuit Judges*.

PER CURIAM: This is an appeal from a judgment of the District Court in a patent infringement case, in which the court directed a verdict for the appellee.[1] Appellant, in

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[1] The patent allegedly infringed is No. 2,585,530, issued to Norman Bennett on February 12, 1952.

addition to challenging the directed verdict, urges that it was error to exclude reports of certain tests and the testimony of proffered witnesses on engineering issues and on damages.

We have carefully examined all of the claims of error in light of the record and find no error warranting reversal.

Affirmed.

CERTIFICATE OF SERVICE

Copy of the foregoing petition mailed on April 1, 1964, to Bacon & Thomas, Shoreham Building, and Steptoe & Johnson, Shoreham Building, Washington, D.C., attorneys for Respondent.

SAMUEL INTRATER

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IN THE

Supreme Court of the United States

OCTOBER TERM—1963

No. 964

NORMAN BENNETT,
Petitioner,

vs.

FORD MOTOR COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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NORMAN BENNETT,
Petitioner,
vs.
FORD MOTOR COMPANY,
Respondent.
No. 964

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a patent case tried to a jury in which, at the close of petitioner's proofs, the trial court ruled that petitioner had not adduced sufficient evidence to establish infringement and directed a verdict for respondent. The court of appeals affirmed and later denied *en banc* a petition for rehearing *en banc*. 325 F. 2d 230.

The Question Presented For Review

The Record does not present the questions asserted in the petition.

The only question presented is whether the trial court erred in ruling that petitioner had failed to produce sufficient or substantial evidence or more than a scintilla of evidence that respondent had infringed the patent and that reasonable men could not differ on this and in, therefore, directing the jury to return a verdict for respondent.

Statement of the Case

This case is an ordinary patent infringement action involving a patent for an automobile bumper. The only alleged infringement consists of the bumpers which were used in 1952 and 1953 on respondent's Mercury automobiles.

This case turns upon its own facts and does not present any unsettled or disputed questions of law. It does not involve any issue likely to affect any other case.

There is no conflict and the action of the courts below is in full accord with applicable decisions of this Court and of the courts of appeal.

There is no question of general interest or public importance. The decision below is correct.

The bumper of the patent in suit consists of a lower horizontal bumper member mounted on the front of the car like any conventional bumper. There is also an upper horizontal member that is supported above the lower bumper member on vertical grille bars that extend downwardly across the face of the lower bumper member and thence back to the frame or chassis of the car where they are fastened.

According to the patent, impact upon the upper bumper member, which can move rearwardly independently of the lower bumper, will move it rearwardly and the vertical grille bars will flex at the contact area with the lower bumper member, the latter serving as a fulcrum.

The claims of the patent all specify not merely that the vertical grille bars be resilient, but that they be "substantially resilient" and that they be "connected at their lower ends to the chassis of the automobile" (JA 6a).

The Mercury bumper has both an upper and a lower horizontal bumper member. These members, however, are not independent of one another as in the patent, but are

bolted together at their ends to form a unit. It has vertical members extending from the upper horizontal bumper member to the lower one.

To establish infringement, petitioner had to prove that these vertical members were "substantially resilient" as specified in the claims, not merely that they were resilient. He also had to prove that they were connected at their lower ends to the chassis of the automobile as specified in the claims.

Petitioner directed his proof to the fact that steel is a resilient material in that it may be deformed, within certain limits, and will return to its original condition without permanent deformation. His evidence, however, did not establish the degree of resilience of these vertical members or that they were "substantially resilient" as specified in the claims. He did not show how much these arms could be deflected without permanent deformation (JA 178, 180-1, 184).

Petitioner defined substantially resilient as having a significant amount of resilience—enough to do good (JA 128, 184-5), but acknowledged that the frame of a vehicle equipped with a Mercury bumper would be damaged at impacts as low as 1.91 miles per hour—the precise effect the patented structure was designed to avoid (JA 81-2, 98-100, 107, 132-3).

The inadequacy of petitioner's proof on the question of "substantial" resiliency of respondents' vertical members is pointed up by the members themselves, Exhibit 5, and the testimony about them. They are relatively short and have deep drawn U-shaped sections which make them very rigid. Petitioner's expert could not say how much they would deflect before permanent deformation—i.e., how resilient they were (JA 132-3) and the proof on what good such resilience accomplished was admittedly deficient (JA 180-1, 183-4).

Petitioner admitted that the vertical members of the Mercury bumper are not connected at their lower ends to the chassis of the automobile (JA 41). Petitioner's expert acknowledged that there is nothing corresponding to the lower portion of the vertical grille bars of the patent which extend back to the frame (JA 118-20).

At the close of petitioner's case, respondent moved under Rule 50 of the Federal Rules of Civil Procedure for a directed verdict. The trial court granted the motion.

The court did not rule that respondent's *bumper* was not resilient as petitioner says, page 2.

The court concluded that there was not sufficient or substantial proof that the *vertical members* of the Mercury bumper were "substantially resilient" as specified in the claims of the patent and that reasonable men could not differ on this question (JA 185).

The court ruled that there was "not sufficient evidence or substantial evidence, or more than a scintilla of evidence to show that the defendant infringed the patent" and that there was not sufficient evidence to go to the jury on this question (JA 186).

ARGUMENT

There Is No Conflict With any Ruling of This Court

The trial court recognized the duty imposed on him by this Court in *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205 (1936) to direct a verdict for the defendant in a patent case if the evidence is not sufficient to establish infringement.

The trial court here concluded that the evidence was not sufficient to go to the jury on the question of infringement. It cannot be said that he deprived petitioner of the right to trial by jury by thus performing the duty imposed by this Court.

In this case, there was not sufficient evidence to go to the jury that the vertical members were "substantially resilient" as specified in the claims. The court did not rule that the bumper was not resilient. The court ruled that there was not sufficient evidence that the vertical members were "substantially resilient."

There is No Conflict With Other Circuits

Petitioner refers to *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F. 2d 246, 255-6 (9 Cir. 1957), and *Hansen* v. *Safeway Stores Inc.*, 238 F. 2d 336 (9 Cir. 1956), (erroneously cited as 238 F. 2d 198 in the petition) as involving conflicting rulings.

In the Moist Cold case, page 251, the court recognized the propriety of granting a directed verdict in a case such as this, but after analyzing all of the evidence, concluded that there had been sufficient evidence to go to the jury in that case. In the Hansen case, the court recognized, page 339, that the trial court should direct a verdict if there is no substantial evidence on any essential issue. After examining the evidence, the court concluded that there had been sufficient evidence in that case.

We submit that there is no conflict and that this Court should not grant certiorari in a case such as this merely to examine the evidence to determine whether the trial court and the court of appeals sitting *en banc* were wrong in their conclusion that the evidence was not sufficient to go to the jury on the question of patent infringement.

The other case cited by petitioner, *Reinharts, Inc.* v. *Caterpillar Tractor Co.*, 85 F. 2d 628 (9 Cir. 1936) was a case in which the court found on the evidence before it that certain metallic members were resilient. There is no conflict calling for certiorari in the present case where the trial court found that the evidence, which is not the same as in the Reinharts case, was not sufficient to go to

the jury on whether the vertical members here are "substantially resilient" within the meaning of the patent in suit.

There is No Question of Great Public Importance

This case involves the question of whether the 1952 and 1953 Mercury bumpers, manufactured over ten years ago, infringed the patent in suit. There is no justification for stating that the bumper of the patent in suit or these bumpers involve safety factors of great public importance, either past or current.

CONCLUSION

This case raises no issue which should be reviewed by this Court. It is an ordinary patent case. The trial court and the court of appeals *en banc* ruled that the evidence of infringement was not substantial or sufficient to warrant submitting it to the jury and directed a verdict just as the decisions of this court require. We submit that this Court should not be called upon to repeat this review of the evidence.

It is respectfully submitted that the Petition should be denied.

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Dated: April 22, 1964

CERTIFICATE OF SERVICE

A copy of the foregoing Respondent's Brief In Opposition To Petition For Writ Of Certiorari was served upon petitioner's attorney Samuel Intrater, 1010 Vermont Ave., N.W., Washington, D. C. on April 22, 1964 by depositing the same in a United States Post Office at New York, New York, with first-class postage pre-paid addressed to counsel of record for petitioner at his Post Office address.

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Ralph L. Chappell
Attorney for Respondent